CLERK'S COPY. 2631

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 223.

EUGENE C. GORDON, FOR THE USE OF MARY G. ROBEY, PLAINTIFF IN ERROR,

vs.

ARTHUR E. RANDLE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 30, 1899.

(18,855.)

(18,385.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 229.

EUGENE C. GORDON, FOR THE USE OF MARY G. ROPER, PLAINTIFF IN ERROR,

vs.

ARTHUR E. RANDLE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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Transcript of Record.

Court of Appeals, District of Columbia, January Term, 1901.

EUGENE C. GORDON, for the Use of MARY G. ROPER, Appellant, *vs.* ARTHUR E. RANDLE. } No. 1063.

Appeal from the Supreme Court of the District of Columbia.

Filed February 23, 1901.

b

Supreme Court of the District of Columbia.

EUGENE C. GORDON, for the Use of MARY G. Roper, *vs.* ARTHUR E. RANDLE. } No. 40958. At Law.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1

Amended Declaration, &c.

Filed April 27, 1897.

In the Supreme Court of the District of Columbia, the 20th Day of April, 1897.

EUGENE C. GORDON, for the Use of MARY G. Roper, Plaintiff, *vs.* ARTHUR E. RANDLE, Defendant. } No. 40958. At Law. Docket No. 45.

1. The plaintiff sues the defendant for money payable by the defendant to the plaintiff for that, on the twentieth day of April 1892 the defendant Arthur E. Randle by the name of A. E. Randle, made a certain promissory note now overdue, and thereby promised to pay to the order of the plaintiff Eugene C. Gordon by the name of E. C. Gordon, for the benefit of Mrs. Mary G. Roper, on or before the twentieth day of April 1893, twenty-five hundred dollars ($2500) with interest thereon at the rate of six per centum per annum until paid, and payable at the Bank of Athens, Alabama, that at its maturity the said note was duly presented for payment, and was dishonored; notwithstanding which the said note has not been paid.

2. And the plaintiff also sues the defendant for money payable by the defendant to the plaintiff for that on the twentieth day of April 1892 the defendant Arthur E. Randle by the name of A. E. Randle made a certain promissory note now overdue and thereby promised to pay to the order of the plaintiff Eugene C. Gordon by the name of E. C. Gordon for the benefit of Mrs. Mary G. Roper on or before the twentieth day of April 1894, thirty-four hundred dollars with interest thereon at the rate of six per centum per annum until paid and payable at the Bank of Athens Alabama, that at its maturity the said note was duly presented for payment and was dishonored notwithstanding which the said note has not been paid.

2 3. And for money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant; and for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at his request and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims fifty-nine hundred dollars ($5900) with interest at the rate of six per cent. per annum from the twentieth day of April 1892 until paid, according to the particulars of demand hereto annexed, besides costs of this suit.

S. HERBERT GIESY,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day exclusive of Sundays and legal holidays occurring after the day of the service hereof; otherwise, judgment.

S. HERBERT GIESY,
Attorney for Plaintiff.

Particulars of Demand.

Note dated April 20, 1892 and payable on or before the 20th day of April 1893 with interest at 6 % per annum until paid	$2500
Note dated April 20, 1892 and payable on or before the 20th day of April 1894 with interest at 6 % per annum until paid	3400
	$5900

Also interest at 6 % per annum from April 20th, 1892 to date of judgment.

3 *Affidavit.*

DISTRICT OF COLUMBIA, *To wit:*

S. Herbert Giesy swears that he is the attorney for the plaintiff named in the declaration to which this affidavit is attached, and

which is referred to and made a part of this affidavit; that the plaintiff's cause of action therein is for two promissory notes given for value received and still unpaid though due and the sum of fifty-nine hundred dollars ($5900) with interest, as therein claimed, is justly due and owing to the plaintiff from the defendant by reason of the premises, exclusive of all set-offs and just grounds of defense.

S. HERBERT GIESY.

Subscribed and sworn to before me this 20" day of April, 1897.

JOHN R. YOUNG, *Clerk.*

Endorsed.

Leave to amend the declaration, and to file amended declaration and notice to plead and defendant to plead within 20 days thereafter.

L. E. McCOMAS,
Associate Justice.

Motion to Vacate Leave to Amend, &c.

Filed May 10, 1897.

In the Supreme Court of the District of Columbia.

E. C. GORDON, for Use of MARY G. ROPER, Plaintiff,
vs.
ARTHUR E. RANDLE, Defendant. } No. 40958. Law.

Now comes the defendant in the above-entitled cause and moves the court to vacate the leave to amend granted the plaintiff
4 therein, and to strike from the files the amended declaration, on the ground that the motion for said leave to amend was without notice to the defendant or his counsel.

J. J. DARLINGTON,
Attorney for Defendant.

Please take notice that the foregoing motion will be presented to circuit court No. 2, Mr. Justice McComas, presiding, on Friday, the 14th day of May, A. D. 1897, at 10 o'clock a. m., or so soon thereafter as counsel can be heard.

J. J. DARLINGTON,
Attorney for Defendant.

Supreme Court of the District of Columbia.

FRIDAY, *May* 28, 1897.

Session resumed pursuant to adjournment, Mr. Justice McComas, presiding.

* * * * * * *

E. C. GORDON, Use of MARY G. ROPER, Plaintiff,
vs.
ARTHUR E. RANDLE, Defendant.
} At Law. No. 40958.

Upon hearing the motion to strike the amended declaration herein from the files, it is considered that said motion be, and the same is, hereby overruled, with leave to defendant to plead within twenty days.

5 *Pleas.*

Filed June 12, 1897.

In the Supreme Court of the District of Columbia.

EUGENE C. GORDON, for Use of MARY G. Roper, Plaintiff,
vs.
ARTHUR E. RANDLE, Defendant.
} No. 40958. At Law.

1. The defendant, Arthur E. Randle, for plea to the plaintiff's declaration in the above-entitled cause, says that he did not promise as alleged.

2. For further plea to the said declaration, the defendant says he is not indebted as is alleged.

3. And, for further plea to the said declaration, the defendant says that the plaintiff's cause of action did not accrue within three years before suit brought.

4. And, for further plea to the plaintiff's declaration, the defendant says that the consideration for the promissory notes sued upon in said declaration was the conveyance by the plaintiff to the defendant of the Stansbury Mill property located in Carrollton, Mississippi, upon an agreement between the plaintiff and the defendant, under the name of the Delta and Wolien Cotton Mill and Land Company that the defendant should incorporate the same, issue bonds of the said corporation, and that the plaintiff would take said bonds to the amount of $9,000, sufficient to discharge the said notes, and, also, a mortgage, of $2,500 and accrued interest aggregating about $3,000 constituting an encumbrance upon said property; that the plaintiff, did, accordingly, subscribe in writing for $9,000 of the said bonds, to be taken, and paid for by him, when issued, by cancellation and surrender of the said notes and removal and discharge of the said mortgage debt; that the defendant, in pursuance of the

said agreement between them, did incorporate the Delta
6 Cotton and Wollen Mill and Land Company, tendered to the plaintiff $9,000 of the bonds of said company duly issued, for which the said plaintiff had subscribed as aforesaid, but the said plaintiff refused to accept the same, and they are still held by this defendant for said plaintiff and subject to his order, upon cancellation and surrender by him of the said promissory notes and discharge of the said mortgage.

J. J. DARLINGTON,
Att'y for Def't.

Filed June 12, 1897.

DISTRICT OF COLUMBIA, *ss:*

I, Arthur E. Randle, on oath say that I am the defendant in the above-entitled law cause No. 40,958 at law; that, of the two promissory notes described in the plaintiff's declaration, the first became due and payable, and that the plaintiff's cause of action thereon, if he ever had any, accrued more than a year before the filing of the original declaration in this cause, and that the second of said notes matured more than three years before the filing of the amended declaration herein. I further on oath say that the consideration of both of the said promissory notes was the conveyance by the plaintiff to me of certain property in Carrollton, Mississippi, then known as the Stansbury cotton mill, under an agreement between the plaintiff and this defendant that I should incorporate the Delta Cotton and Wollen Mill and Land Company, which should own the said property, and that the plaintiff would subscribe for $9,000 of bonds to be issued by the said corporation, which bonds he should pay for by the cancellation and surrender of the said promissory notes, and the discharge by him of a mortgage which then existed upon said property of $2,500 and accrued interest thereon, in all about $3,000; that, in pursuance of the said contract and agreement between us, I duly caused the said company *to* be incorporated and bonds to be issued,
$9,000 of which bonds was by me duly tendered to the said
7 plaintiff, who, however, refused to comply with his part of the said contract, and to take the said bonds; that I still hold them, subject to his order, upon the cancellation and surrender by him to me of the said promissory notes, and the discharge of the said mortgage upon said property; and that, to the best of my knowledge and belief I am not jointly indebted to the plaintiff in the sum claimed by him in his said declaration or in any other sum or sums whatsoever.

ARTHUR E. RANDLE.

Subscribed and sworn to before me this 12th day of June, A. D. 1897.

RUTLEDGE WILLSON,
Notary Public. [SEAL.]

Joinder of Issue.

Filed December 15, 1897.

In the Supreme Court of the District of Columbia.

EUGENE C. GORDON, for the Use of MARY G. Roper, Plaintiff,
vs.
ARTHUR E. RANDLE, Defendants. } At Law. No. 40958.

1. The plaintiff joins issue upon the defendant's first plea.
2. The plaintiff joins issue upon the defendant's second plea.
3. The plaintiff says that the note for $3400 and interest at 6 % dated the 20th day of April 1892 was not due until the 20th day of April 1894 and that suit was brought thereon on the 20th day of April 1897 and that there was a new promise to pay the note for $2500 and interest at 6 % dated the 20th day of April 1892 made within three years before the bringing of this suit.
4. The plaintiff says that it is true that the consideration for the promissory notes sued upon in his declaration was the conveyance to the defendant of the Stansbury Mill property located in
8 Carrollton, Mississippi but that the subscription for $9000 worth of the bonds of the Delta Cotton and Wollen Mill and Land Company was a separate and distinct transaction.
5. The plaintiff says that the $9,000 worth of the bonds of the Delta Cotton and Wollen Mill and Land Company have never been tendered to him.

S. HERBERT GIESY,
Attorney for Plaintiffs.

Rejoinder & Demurrer.

Filed February 8, 1898.

In the Supreme Court of the District of Columbia.

EUGENE C. GORDON
vs.
ARTHUR E. RANDLE. } At Law. No. 40958.

1. The defendant joins issue upon the plaintiff's replication to the third plea in the above-entitled cause.
2. The defendant says that the plaintiff's fourth and fifth replications are bad in substance.

J. J. DARLINGTON,
Attorney for Defendant.

NOTE.—Among the matters of law intended to be argued in support of the foregoing demurrer are, that it is immaterial whether or

not the subscription for nine thousand dollars worth of the bonds of the Delta Cotton and Wollen Mill and Land Company was a separate and distinct transaction from conveyance to the defendant of the mill property, and that it is, also, immaterial whether nine thousand dollars worth of the bonds of said company were tendered to the plaintiff.

9 April Term, 1898.

Proceedings before the supreme court of the District of Columbia, holding a circuit court, division No. 2, and a special term, in and for said District, commencing on the fifth day of April, 1898.

TUESDAY, *April* 5, 1898.

The court opens at ten o'clock a. m., by proclamation of the marshal, pursuant to the rule of court, by order of the Honorable Louis E. McComas, an associate justice of said court, who presided.

* * * * * * *

E. C. GORDON, Use, etc., Plaintiff,
vs.
ARTHUR E. RANDLE, Defendant. } At Law. No. 40958.

Upon hearing the defendant's demurrer to the fourth and fifth replication, it is by the court considered that the same be and hereby is sustained.

Joinder of Issue.

Filed April 12, 1898.

In the Supreme Court of the District of Columbia, the 12th Day of April, 1898.

EUGENE C. GORDON, for the Use of MARY G. Roper, Plaintiff,
vs.
ARTHUR E. RANDLE, Defendant. } No. 40958. At Law.

The plaintiff joins issue upon the defendant's fourth plea.

S. HERBERT GIESY,
Attorney for Plaintiff.

To J. J. Darlington, attorney for —.

Service of copy of above acknowledged this 12 day of April, 1898

J. J. DARLINGTON,
Attorney for Defendant.

10 *Motion to Produce.*

Filed October 30, 1900.

In the Supreme Court of the District of Columbia.

EUGENE C. GORDON, for the Use of MARY G. Roper,
vs.
ARTHUR E. RANDLE.
} At Law. No. 40958, Docket —.

Now comes the plaintiff by his attorney and moves the court to order the defendant Arthur E. Randle to produce on the trial the charter evidencing the incorporation of the Delta Cotton and Wollen Mill and Land Company; the bonds of said company amounting to nine thousand dollars ($9,000) alleged to have been tendered to the plaintiff and the deed conveying the property purchased by the defendant from the plaintiff to the Delta Cotton and Wollen Mill and Land Company.

S. HERBERT GIESY,
Attorney for Plaintiff.

To J. J. Darlington, attorney for defendant:

Please take notice that I will call up the above motion for action before Justice Bradley in circuit court No. 2 on Thursday, the 1st day of November, 1900.

S. HERBERT GIESY,
Attorney for Plaintiff.

Service of copy of above motion and notice acknowledged this 29th day of October, 1900.

J. J. DARLINGTON,
J. D. S.,
Attorney for Defendant.

Memorandum.

November 16, 1900.—Verdict for defendant.

11 Supreme Court of the District of Columbia.

FRIDAY, *December* 14, 1900.

Session resumed pursuant to adjournment, Mr. Justice Bradley, presiding.

* * * * * * *

EUGENE C. GORDON, for the Use of MARY G. Roper, Plaintiff,
vs.
ARTHUR E. RANDLE, Defendant.
} No. 40958. At Law.

This cause coming on to be heard upon the plaintiff's motion for a new trial, and the same being heard, it is considered that said

motion be, and the same is hereby overruled, and judgment on verdict is ordered: Therefore, it is considered that the plaintiff take nothing by his suit, that the defendant go thereof without day, and recover against the plaintiff his costs of defense to be taxed by the clerk, and have execution thereof.

Whereupon, the plaintiff in open court prays an appeal to the Court of Appeals of the District of Columbia, which is allowed, and the bond for costs fixed at one hundred ($100) dollars, with leave to said plaintiff to deposit fifty ($50) — in the registry of the court in lieu thereof.

Memorandum.

January 7, 1901.—$50 deposited by plaintiff in lieu of appeal bond.

12 *Notice of Time of Settlement of Bill of Exceptions.*

Filed January 16, 1901.

In the Supreme Court of the District of Columbia.

EUGENE C. GORDON, for the Use of MARY G. Roper, vs. ARTHUR E. RANDLE. } At Law. No. 40958.

Please take notice that on Monday the 28th day of January 1901 I will present the bill of exceptions to the court for settlement before Justice Bradley in circuit court No. 2.

S. HERBERT GIESY,
Attorney for Plaintiff.

To J. J. Darlington, attorney for defendant.

Service acknowledged this 17th day of January, 1901.

J. J. DARLINGTON,
For Defendant.

Stipulation as to Filing Bill of Exceptions.

Filed January 28, 1901.

In the Supreme Court of the District of Columbia.

EUGENE C. GORDON, for the Use of MARY G. Roper, vs. ARTHUR E. RANDLE. } 40958. Law.

It is hereby stipulated that the bill of exceptions in the above cause as prepared by and on behalf of plaintiff and not agreed to on behalf of the defendant was tendered to the trial court on this 28th

day of January, 1901, for settlement and that the same may
13 be filed in the cause as having been so tendered without prejudice to the rights of either party.

S. HERBERT GIESY,
Attorney for Plaintiff.
J. J. DARLINGTON,
Attorney for Defendant.

Memorandum.

January 28, 1901.—Bill of exceptions filed as per stipulation.

Order for Preparation of Record.

Filed February 7, 1901.

In the Supreme Court of the District of Columbia.

EUGENE C. GORDON
vs.
ARTHUR E. RANDLE. } At Law. No. 40958, Docket 45.

The clerk will please prepare the record for appeal in the above-entitled cause and include therein

April 27, 1897.—Amended declaration.
May 10, 1897.—Motion to strike amended declaration from the files.
May 28, 1897.—Motion to strike out overruled.
June 12, 1897.—Pleas to declaration and affidavit of defendant.
Dec. 15, 1897.—Joinder in issue on 1st and 2nd pleas and replication.
Feb'y 8, 1898.—Joinder in issue on plaintiff's replication to 3rd plea and demurrer to 4 & 5 replication.
April 5, 1898.—Demurrer sustained.
14 April 12, 1898.—Joinder in issue.
Oct. 30, 1900.—Motion to require defendant to produce papers for trial.
Nov. 16, 1900.—Verdict.
Dec. 14, 1900.—Motion for new trial overruled and judgment on verdict for def't for costs, appeal noted and bind fixed at $100 or in lieu thereof $50 cash.
Jan'y 7, 1901.—$50 deposit.
" 17, 1901.—Notice of time of settlement of bill of exceptions.
" 28, 1901.—Stipulation as to filing bill of exceptions.
" 28, 1901.—Bill of exceptions tendered to court and filed as per stipulation.

S. HERBERT GIESY,
Attorney for Plaintiff.

Service of copy of above order acknowledged this 6th day of February, 1901.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 18, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 40958, at law, wherein Eugene C. Gordon, for the use of Mary G. Roper, is plaintiff, and Arthur E. Randle is defendant, as the same remains upon the files and of record, in said court.

15 In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 23d day of February, A. D. 1901.

Seal of Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

District of Columbia supreme court. No. 1063. Eugene C. Gordon, for the use of Mary G. Roper, appellant, *vs.* Arthur E. Randle. Court of Appeals, District of Columbia. Filed Feb. 23, 1901. Robert Willett, clerk.

16 In the Court of Appeals of the District of Columbia.

EUGENE C. GORDON, for the Use of MARY G. ROPER, *vs.* ARTHUR E. RANDLE. } No. 1063.

To the Court of Appeals of the District of Columbia:

Your petitioner states as follows:

1. That he is the plaintiff in the above-entitled cause and that he directed his attorney S. Herbert Giesy to note and perfect an appeal from the judgment rendered against him in circuit court No. 2, Mr. Justice Bradley presiding on the 14th day of December 1900.

2. That the seventh day of January 1901 his attorney deposited with the clerk of the supreme court of the District of Columbia the fifty dollars required to be deposited in lieu of bond; that on the same day his attorney moved that the October term be prolonged by adjournment in order to prepare the bill of exceptions in accordance with the rules of the supreme court of the Dist. of Columbia which motion was overruled on the ground that the October term had ended on the 31st day of December 1900 although rule 3 of the said supreme court prescribes that the terms of the circuit court shall begin on the first Tuesday of October, January and April and Tuesday the 1st day of January 1901 was New Year's day and a legal holiday in the District of Columbia and the first Tuesday in January which was a *dies juridicus* was the eighth day of January 1901 and in recognition of this fact the minutes of cir-

cuit court No. 2 Mr. Justice Bradley presiding for January 1, 1901 contain the following:

"This being a legal holiday, the attendance of the persons reporting is noted and those not excused from serving are excused until tomorrow morning at 10 o'clock without qualifying."

Equity court No. 1 Mr. Justice Hagner presiding held no
17 session of court on January 1st, 1901 but began the January term on the first Wednesday of January 1901 instead of the first Tuesday.

3. That in accordance with the rules of the supreme court of the District of Columbia on the 17th day of January 1901 he submitted to the opposing counsel the bill of exceptions proposed to be settled and gave notice that on the 28th day of January 1901 he would ask the court to settle the bill of exceptions; that on the 28th day of January 1901 the bill of exceptions was presented to Mr. Justice Bradley sitting in circuit court No. 2 who declined to settle the same unless the defendant consented, as the October term had not been prolonged; that counsel for defendant declined to consent to the bill of exceptions being settled and your petitioner was forced to perfect his appeal to this court without any bill of exceptions.

4. That the following language of section 2 of rule 54:

"SEC. 2. The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it, but not longer than thirty-eight days, exclusive of Sundays, save in case of a trial begun during a term but not concluded until after the expiration of the term, in which case the trial justice may extend the term in his discretion in order to prepare a bill of exceptions"

imposes a duty on the court to settle a bill of exceptions and does not grant a discretion to settle or not to settle a bill of exceptions.

That heretofore it has been the custom to enter general orders extending the term for the settlement of bills of exceptions in the following or equivalent language:

"It is ordered that the January term 1898 be and hereby is prolonged for thirty days in the above-entitled cases for the purpose of settling bills of exceptions" as will be seen by reference to

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"	"	37	"	405
"	"	38	"	123
"	"	38	"	407
"	"	41	"	120

18 5. That without the bill of exceptions your petitioner cannot have the rulings of the court below reviewed by this honorable court which may result not only in his pecuniary loss but in injury to his personal reputation and being without other remedy.

He therefore prays that the writ of mandamus may issue from this honorable court requiring Andrew C. Bradley, an associate

justice of the supreme court of the District of Columbia, to settle the bill of exceptions in this cause.

EUGENE C. GORDON.

I do solemnly swear that I have read the petition by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

EUGENE C. GORDON.

Subscribed and sworn to before me this 2nd day of March 1901.

ROBERT WILLETT, *Clerk.*

In the Court of Appeals of the District of Columbia.

EUGENE C. GORDON, for the Use of MARY G. ROPER, vs. ARTHUR E. RANDLE. } No. 1063.

Personally appeared before me Robert Willett, clerk of the Court of Appeals, S. Herbert Giesy who being first duly sworn, deposeth and saith that he is the attorney for the plaintiff in the above-entitled cause that on the seventh day of January 1901 he deposited with the clerk of the supreme court of the District of Columbia the fifty dollars directed by the court to be deposited in lieu of bond and made a motion in circuit court No. 2, Mr. Justice Bradley
19 presiding that the term be prolonged for the settlement of the bill of exceptions. That he believed at that time that the eighth of January 1901 was the beginning of the January term as Tuesday the first day of January 1901 was a legal holiday and a *dies non juridicus.* That when the bill of exceptions was presented to the court on the 28th day of January 1901 Mr. J. J. Darlington the attorney for the plaintiff stated that he had no objection to the bill of exceptions except that he did not think it complied with the rules of the Court of Appeals in that a large part of the evidence was given in full but the court itself raised the point that the term had not been extended and asked Mr. Darlington if he consented to the settlement of the bill under those circumstances when Mr. Darlington declined to do so without first having the consent of his client; that afterwards on the first of February 1901 Mr. Darlington wrote deponent that his client would not assent to his allowing the bill of exceptions to be settled by consent.

S. HERBERT GIESY.

Sworn and subscribed to before me this 2d day of March, 1901.

ROBERT WILLETT, *Clerk.*

(Endorsed:) No. 1063. In the Court of Appeals of the District of Columbia. Eugene C. Gordon for the use of Mary G. Roper, appellant, *vs.* Arthur E. Randle. Petition for writ of mandamus to require Andrew C. Bradley an associate justice of the S. C. of D. C. to settle the bill of exceptions. Court of Appeals, District of Columbia. Filed Mar. 2, 1901. Robert Willett, clerk.

20 THURSDAY, *March 7th, A. D.* 1901.

EUGENE C. GORDON, for the Use of MARY G. ROPER,
Appellant,
vs.
ARTHUR E. RANDLE. } No. 1063.

The petition for writ of mandamus to require Andrew C. Bradley and associate justice of the supreme court of the District of Columbia to settle the bill of exceptions in the above-entitled cause was submitted to the consideration of the court by Mr. S. Herbert Giesy in support of petition.

FRIDAY, *March 8th, A. D.* 1901.

EUGENE C. GORDON, for the Use of MARY G. ROPER,
Appellant,
vs.
ARTHUR E. RANDLE. } No. 1063.

It is ordered by the court that counsel be heard orally on petition for mandamus in the above-entitled cause on Tuesday March 12, 1901.

21 TUESDAY, *March 12th, A. D.* 1901.

EUGENE C. GORDON, for the Use of MARY G. ROPER,
Appellant,
vs.
ARTHUR E. RANDLE. } No. 1063.

The petition for writ of mandamus to require Andrew C. Bradley an associate justice of the supreme court of the District of Columbia, to settle the bill of exceptions in the above-entitled cause, was argued by Mr. S. Herbert Giesy in support of petition, and by Mr. J. J. Darlington in opposition thereto.

EUGENE C. GORDON, for the Use of MARY G. ROPER,
Appellant,
vs.
ARTHUR E. RANDLE. } No. 1063

On consideration of the appellant's petition for a writ of mandamus to require Andrew C. Bradley an associate justice of the supreme court of the District of Columbia, to settle the bill of exceptions in the above-entitled cause, it is by the court now here ordered that said petition be, and the same is hereby, denied, and that the petition be, and the same is hereby, dismissed, with costs.

Per MR. CHIEF JUSTICE ALVEY.

March 12, 1901.

22 TUESDAY, *April 9th, A. D.* 1901.

EUGENE C. GORDON, for the Use of MARY G. ROPER, Appellant, *vs.* ARTHUR E. RANDLE. } No. 1063.

Mr. S. Herbert Giesy of counsel for the appellant, submitted to the court a motion for a writ of error to remove said cause to the Supreme Court of the United States, from an order of this court entered herein on March 12, 1901, overruling petition for writ of mandamus; whereupon it is ordered by the court that said writ be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

23 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Eugene C. Gordon, for the use of Mary G. Roper, appellant, and Arthur E. Randle, appellee, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 9th day of April, in the year of our Lord one thousand nine hundred and one.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

24 FRIDAY, *January 17th, A. D.* 1902.

EUGENE C. GORDON, for the Use of MARY G. ROPER, Appellant, *vs.* ARTHUR E. RANDLE. } No. 1063.

The bond on the writ of error to the Supreme Court of the United States was submitted to the court for approval by Mr. S. Herbert

Giesy; whereupon it is ordered by the court that said bond be, and the same is hereby, approved and ordered filed.

25 Know all men by these presents, that we, Eugene C. Gordon, as principal, and Mary G. Roper and The United States Fidelity and Guaranty Company a Maryland corporation, as sureties, are held and firmly bound unto Arthur E. Randle in the full and just sum of three hundred dollars to be paid to the said Arthur E. Randle his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17 day of January, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between Eugene C. Gordon to the use of Mary G. Roper, and Arthur E. Randle a judgment was rendered against the said Eugene C. Gordon to the use of Mary G. Roper and the said Eugene C. Gordon having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Arthur E. Randle citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, that if the said Eugene C. Gordon to the use of Mary G. Roper shall prosecute the writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

EUGENE C. GORDON. [SEAL.]
MARY G. ROPER. [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY CO., [SEAL.]
By J. S. SWORMSTEDT, *Attorney-in-fact.*

[Seal of U. S. Fidelity and Guaranty Co.]

Sealed and delivered in the presence of—
—— ——.

Approved by—
R. H. ALVEY, *Ch. Justice.*

[Endorsed:] No. 1063. Eugene C. Gordon for the use of Mary G. Roper appellant *vs.* Arthur E. Randle. Bond on writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jan. 17, 1902. Robert Willett, clerk.

26 UNITED STATES OF AMERICA, *ss:*

To Arthur E. Randle, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Eugene C. Gordon, for the use of Mary G. Roper, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 17th day of January, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted, Jan. 18, 1902.

J. J. DARLINGTON,
Att'y for Defendant in Error.

27 Court of Appeals of the District of Columbia, January Term, 1902.

EUGENE C. GORDON, for the Use of MARY G. ROPER, Appellant,
vs.
ARTHUR E. RANDLE.
} No. 1063.

The clerk in preparing the transcript for the Supreme Court of the United States will please certify the following:

The transcript of record as received from the supreme court of the D. C.

Petition for writ of mandamus and proceedings thereunder including dismissal.

Prayer for writ of error and order allowing same.

S. HERBERT GIESY,
Attorney for Appellant.

(Endorsed:) No. 1063. Court of Appeals of the District of Columbia. Order for transcript of record to Supreme Court United States. Court of Appeals, District of Columbia. Filed Jan. 20, 1902. Robert Willett, clerk.

28 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing is a true and complete transcript of the record and all proceedings in said Court of Appeals in the case of Eugene C. Gordon for the use of Mary G. Roper, appellant, *vs.* Arthur E. Randle, No. 1063, January term, 1902, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 28 day of January, A. D. 1902.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,385. District of Columbia Court of Appeals. Term No. 229. Eugene C. Gordon for the use of Mary G. Roper, plaintiff in error, *vs.* Arthur E. Randle. Filed January 29, 1902.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 229.

EUGENE C. GORDON, FOR THE USE OF MARY G. ROPER, PLAINTIFF IN ERROR,

vs.

ARTHUR E. RANDLE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

STATEMENT OF THE CASE.

This was an action in debt on two certain promissory notes tried in the supreme court of the District of Columbia, holding a circuit court division No. 2. An appeal from the judgment of the court in favor of the appellee was properly noted (R., p. 9), and all requirements of the rules of both the supreme court of the District of Columbia and the Court of Appeals of the District of Columbia were complied with for the proper perfecting of said appeal, but the court declined to sign the bill of exceptions, because the term in which the case was tried had not been prolonged by adjournment taken specifically in behalf of this particular case. Counsel for the

appellant, on the 7th day of January, 1901, had moved in open court that the term be prolonged by adjournment for the settlement of the bill of exceptions, but the motion was overruled on the ground that the October term had ended on the 31st day of December, 1900, and the January term had begun on the 1st day of January, 1901, although that was a legal holiday in the District of Columbia (R., p. 13). The appellant perfected his appeal in accordance with the rules of both courts, so far as he could without the bill of exceptions, and filed the transcript of the record in the Court of Appeals of the District of Columbia (R., p. 11), and after said appeal was docketed filed in the case his petition to the said Court of Appeals for a writ of mandamus requiring the justice who presided in said circuit court No. 2 to settle and sign the bill of exceptions, in order that the appeal might be heard and determined by the said Court of Appeals (R., pp. 11 and 12). The Court of Appeals set the petition for the writ of mandamus down for argument, and it was urged by counsel for the appellant that the October term had not ended when the motion for prolongation of the term by adjournment was made on the 7th day of January, 1901, and, further, that a formal motion for the prolongation of the term by adjournment was not necessary, as the rule of court provided that thirty-eight days should be allowed for the settlement of bills of exceptions, and that it was the duty of the court to prolong the term by adjournment for that purpose. The Court of Appeals denied the petition and dismissed it with costs, but gave no reasons for so doing and filed no written opinion on the questions involved (R., p. 14).

ERROR.

The writ of mandamus should not have been denied.

ARGUMENT.

The writ of mandamus was the proper remedy to require the judge to settle and sign the bill of exceptions.

The Chateaugay Ore and Iron Company, petitioner, 128 U. S., 557.

Ex parte Crane, 5 Peters, 190.

The writ should have issued and the hearing of the questions involved should have been had after a return thereto.

"And, further, that the writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process of a court of justice, to which every one is entitled when it is the appropriate process for ascertaining the right he claims."

Kentucky *vs.* Dennison, 24 Howard, 98.

"Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular."

Lord Mansfield, Rex *vs.* Wilkes, 4 Burrows, 2539.

Ex parte Mackey, 15 S. C., 328.

The refusal of the writ left unsettled the questions of law sought to be determined by the petition, though they were not frivolous but of vital importance to the rights of the appellant, and that notwithstanding the provision of law—

"That the opinion of the said Court of Appeals in every case shall be rendered in writing and shall be filed in such case as a part of the record thereof."

27 Statutes at Large, 436, sec. 10.

WHEN DID THE OCTOBER TERM END?

Rule 3 of the supreme court of the District of Columbia was as follows:

The terms of the court shall be held as follows:
Of the general term on the—
First Monday of January.
First Monday of April.
First Monday of October.
Of the circuit courts on the—
First Tuesday of January.
First Tuesday of April.
First Tuesday of October.
Of the equity court on the—
First Tuesday of every month.
Of the district court on the—
First Monday of January.
First Monday of July.
Of the criminal courts on the—
First Tuesday of January.
First Tuesday of April.
First Tuesday of October.

Each term shall continue until the commencement of the next succeeding term.

The first Tuesday of January, 1901, was the 1st day of January, 1901, or New Year's day, and a legal holiday in the District of Columbia, and therefore a *dies non juridicus*.

Revised Statutes relating to the District of Columbia, sec. 993.

"The day on which the cause was tried and judgment rendered was a legal holiday, and hence was, as the term *holiday* imports, *dies non juridicus*."

Such being the case, the court had no authority to hear the cause and render judgment on that day, and would not have authority to do so, even though the express prohibition contained in section 2 of chapter 58, *supra*, had been omitted from the statute.

Lampe *vs.* Manning, 38 Wis., 674.
Michie *et al. vs.* Michie's Adm. *et al.*, 17 Gratt., 109.
Butler *vs.* Kelsey, 15 Johnson, 177.
Pulling *vs.* The People, 8 Barbour, 384.

"At common law, and since the earliest times, Sunday, it seems has been considered *dies non juridicus*, and all judicial proceedings on that day have, therefore, been held to be void."

24 A. and E. Encyclopædia, 574.

That this was a day upon which the court could do nothing is shown by the fact that the attendance of persons reporting was merely noted, and those not excused from serving were excused without qualifying (R., p. 12).

If the court could do nothing on Tuesday, the 1st day of January, 1901, it could not begin the January term, and the term must have begun on the first juridical Tuesday, or the 8th day of January, 1901. If this were not the case the January term might be begun on another day of the week than Tuesday, although the rule prescribes Tuesday.

Mr. Justice Hagner began the January term of the equity court on the first Wednesday of January, 1901, notwithstanding the provision of rule 3 (R., p. 12):

"Of the equity court on the—
"First Tuesday of every month."

In Wisconsin, in 1869, this difficulty was provided against by statute, which "declared that when the day for the meeting of the court should fall on a legal holiday, it should be adjourned to the following day."

In re Worthington, 7 Bissell, 457.

Likewise in Virginia:

Michie *et al. vs.* Michie's Adm. *et al.*, 17 Gratt., 111.

If the January term began on the first juridical Tuesday, the October term continued until the 8th day of January, 1901, and the motion made for the prolongation of the term on the 7th day of January, 1901, was within the October term, and should have been granted.

THE RULE OF COURT AUTHORIZED THE SETTLEMENT OF THE BILL OF EXCEPTIONS AFTER THE EXPIRATION OF THE TERM.

Supreme Court of the District of Columbia, in General Term.

JANUARY 27, 1900.

Ordered that section 2 of rule 54 and rule 55 of the common-law rules of this court be, and they hereby are, amended so as to read as follows:

SEC. 2. "The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it, but not longer than thirty-eight days, exclusive of Sundays, save in case of a trial begun during a term but not concluded until after the expiration of the term, in which case the trial justice may extend the term in his discretion in order to prepare a bill of exceptions."

55. "Every bill of exceptions shall be prepared by the counsel of the party tendering it and submitted to the counsel on the other side; and where a bill of exceptions is not settled before the jury retires, the counsel tendering it shall give notice in writing to the opposing counsel of the time at which it is proposed the bill of exceptions shall be settled, and shall also, at least eight days, exclusive of Sundays, before the time designated in such notice, submit to the opposing counsel the bill of exceptions so proposed to be settled, and the said exceptions shall be presented to the court within thirty-eight days, exclusive of Sundays, after judgment shall have been entered therein, unless the trial justice shall, for good cause shown, extend the time for the presentation thereof, and if the counsel cannot agree, it shall be settled by the justice who presided at the trial; and in that case the

justice shall be attended by the counsel on both sides, as he may direct. *Provided, however*, That all motions in arrest of judgment and for a new trial shall be submitted to the trial justice within fifteen days, exclusive of Sundays and legal holidays, from the date of the verdict, unless the time shall be extended by him for good cause shown. And if said motions shall not be submitted within said fifteen days, or the time extended as aforesaid, the same shall be deemed overruled by force of this rule without any order, and judgment entered accordingly."

By the COURT.

The purpose of the above-quoted rule was to allow thirty-eight days for the settlement of bills of exceptions, and in order to do so it provided that the term might be prolonged by adjournment.

Judgment in this case was entered December 14, 1900 (R., p. 8). The bill of exceptions was submitted to counsel on the other side on the 17th day of January, 1901, and notice given to the opposing counsel of the time at which it was proposed the bill of exceptions should be settled (R., p. 9). The bill of exceptions was presented to the court on the 28th day of January, 1901 (R., p. 13). Each step was taken within the time and according to the requirements of the rule.

This court has said that where there was a standing rule of court which authorized such approval, the bill of exceptions could be settled after the end of the term.

"No order was entered extending the time for its presentation, nor was there any consent of parties thereto, nor any standing rule of court which authorized such approval."

United States *vs.* Jones, 149 U. S., 262.

The only thing lacking was a perfunctory motion to be made on the last day of the October term for the prolongation of the term. This motion could not have been denied by the judge if made. It gave him no discretion to present the settlement and signing of a bill of exceptions by refus-

ing to prolong the term. It was not provided for by the rule of court.

The rule imposed a duty to prolong the term by adjournment for the purpose of settling and signing bills of exceptions, and gave no discretion to prevent the settlement of bills of exceptions by a refusal to prolong the term.

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done."

Supervisors *vs.* U. S., 4 Wallace, 447.
City of Galena *vs.* Amy, 5 Wallace, 708.
United States *vs.* Biertling, 20 Howard, 254.
Coe *vs.* Morgan, 13 Federal Reporter, 844.

"The word 'may' in a statute is sometimes used in a mandatory and sometimes in a directory and permissive sense. It has always been construed 'must' or 'shall' whenever it can be seen that the legislative intent was to impose a duty and not simply a privilege or discretionary power, and when the public is interested and the public or third persons have a claim *de jure*, to have the power exercise."

14 A. and E. Encyclopædia, 979.

In the case heretofore cited on the brief, The Chateaugay Ore and Iron Company, 128 U. S., 556, where the requirements of the rules relating to the settlement of bills of exceptions had been complied with, this court declined to consider the question of the ending of the term.

Ward *vs.* Cochran, 150 U. S., 603.

HOLMES CONRAD.
S. HERBERT GIESY.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 229.

EUGENE C. GORDON, FOR THE USE OF MARY G. ROPER, PLAINTIFF IN ERROR,

vs.

ARTHUR E. RANDLE.

Reply Brief for Plaintiff in Error.

IT WAS ERROR NOT TO ISSUE THE RULE TO SHOW CAUSE OR THE MANDAMUS NISI.

It is urged by the brief of the defendant in error that Justice Andrew C. Bradley was not a party to the suit. This is part of the error complained of by the plaintiff in error. The dismissal of the petition for the writ of mandamus by the Court of Appeals, without issuing a rule to show cause or a mandamus *nisi*, was contrary to the practice prescribed by this court.

"When a rule is laid, as in this case, on the judge of a subordinate court, he is ordered to show cause why the peremptory writ of mandamus shall not issue to him, commanding him to do some act which it is alleged he has power to do,

and which it is his duty to do, and which he has improperly neglected and refused to do, as required by law. Due service of the rule being made the judge is required to make return to the charge contained in the rule, which he may do by denying the matters charged or by setting up new matter as an answer to the accusations of the relator, or he may elect to submit a motion to quash the rule or to demur to the accusative allegations. Matters charged in the rule and denied by the respondent must be proved by the relator and matters alleged in avoidance of the charge made, if denied by the relator, must be proved by the respondent. Motions to quash in such cases are addressed to the discretion of the court, but if the respondent demurs to the rule, or if the relator demurs to the return, the party demurring admits everything in the rule or the return, as the case may be, which is well pleaded, and if the relator elects to proceed to hearing on the return, without pleading to the same in any way, the matters alleged in the return must be taken to be true to the same extent as if the relator had demurred to the return."

Ex parte Newman, 14 Wallace, 166.
Life and Fire Ins. Co. of N. Y. *vs.* Adams, 9 Peters, 571.
Angell and Ames on Corporations, § 727.
Fisher *vs.* The City of Charleston, 17 W. Va., 604.
Merrill on Mandamus, § 250.

Writ of error was the proper method of reviewing the action of the Court of Appeals.

Ward *et al. vs.* Gregory, 7 Peters, 633.

It was proper to make the petition for mandamus in the case pending in the Court of Appeals.

The Life and Fire Insurance Co. of N. Y. *vs.* Heirs of Wilson, 8 Peters, 291.

THE DEATH OF JUSTICE BRADLEY DOES NOT ABATE THE PROCEEDINGS IN MANDAMUS.

"That no writ, action, or other proceeding lawfully commenced by or against the head of any department or bureau or other officer of the United States in his official capacity,

or in relation to the discharge of his official duties shall abate by reason of his death or the expiration of his term of office, or his retirement, or resignation, or removal from office, but in such event the court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the revival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office."

30 U. S. Statutes at Large, 822.

Thompson *vs.* U. S., 103 U. S., 485.

"That a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is by reason of death, sickness, or other disability unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried; holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor."

31 U. S. Statutes at Large, 270.

U. S. *vs.* Briething, 20 How., 252.

"It is the established practice now, both in England and in this State, that when a party without laches on his part loses the benefit of his bill of exceptions by the death or illness of a judge, so that he cannot get his exceptions

signed and sealed, he will be entitled to a new trial, notwithstanding the lapse of considerable time."

State, use of Samuel, *vs.* Weiskittle, 61 Md., 51.
Burnett *vs.* Pen. & O. Steamboat Co., 32 E. L. and Eq., 318.
Newton *vs.* Bordle, 54 E. C. L., 795.

"But the district judge is mistaken in supposing that no one but the judge who renders the judgment can grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done. The court remains the same, and the change of incumbents cannot and ought not in any respect to injure the rights of litigant parties."

Life and Fire Insurance Co. of N. Y. *vs.* Heirs of Wilson, 8 Peters, 303.
Merrill on Mandamus, § 239.

BEGINNING OF THE TERM ON A HOLIDAY.

The suggestion on the brief of defendant in error that the contention of the plaintiff in error "that where a rule or law prescribes a certain thing be done on the first Tuesday or first Monday of a month it must mean the first juridical Tuesday or Monday" would result in there being no term of court if the rule should prescribe that the term should begin on the last Tuesday of February, and that should be the 22d of February, is misleading. Under such a supposititious state of facts, the last juridical Tuesday of February would be the 15th day of February, or it would be the 29th day of February every fourth year.

The question of the legality of the beginning of a term of court on a holiday will arise once a year for the next four years, unless rule 3 of the supreme court of the District of Columbia is revised to in some way provide what shall be done when the designated day fall on a holiday.

The first Monday in July in 1904 is the Fourth of July.
The first Tuesday in July in 1905 is the Fourth of July.
The first Monday in January in 1906 is New Year's Day.
The first Tuesday in January in 1907 is New Year's Day.

Rule 1 of the Court of Appeals of the District of Columbia provides that when the first day of its January term, the first Monday of January, is New Year's Day, that the term shall begin on the next juridical Monday.

"There shall be three terms a year, the same to commence on the first Monday of October, the first Monday after the first day of January, and the first Monday of April in each year."

Revised Rules of the Court of Appeals, promulgated Sept. 29, 1894.

RULE OF COURT ALLOWING 38 DAYS FOR SETTLEMENT OF BILLS OF EXCEPTIONS WAS COMPLIED WITH.

Dec. 14, 1900.—Judgment.	
Dec. 31, 1900.—17 days, less 3 Sundays.....	14
Jan'y 17, 1901.—Notice, 17 days, less 2 Sundays.....	15
	29
Jan'y 28, 1902.—Tender, 11 days, less 2 Sundays.....	9
	38

HOLMES CONRAD,
S. HERBERT GIESY,
Counsel for Plaintiff in Error.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 24 1903
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

EUGENE C. GORDON
vs.
ARTHUR E. RANDLE.
No. 229.

BRIEF FOR DEFENDANT IN ERROR.

J. J. DARLINGTON,
Attorney for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM. 1902.

EUGENE C. GORDON,
vs.
ARTHUR E. RANDLE. } No. 229.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This cause is before this Court upon a writ of error from an order of the Court of Appeals of the District of Columbia denying a petition for a writ of mandamus against Andrew C. Bradley, late an associate justice of the Supreme Court of the District of Columbia, to require him to settle a bill of exceptions upon the following state of facts:

In an action upon a promissory note brought by the plaintiff in error against the defendant in error in the Supreme Court of the District of Columbia, a verdict in favor of the latter was rendered on the 16th day of November, 1900, upon which verdict judgment for the defendant was thereafter duly entered.

The terms of the Circuit Court branch of the Supreme Court of the District of Columbia, in which branch the trial was had, are fixed by Rule 3, of that Court, and commenced on the first Tuesday of January, the first Tuesday of April and the first Tuesday of October; so that the trial of the

case was held at the October, 1900, Term, terminating, under the rule, on the day preceding the first Tuesday in January, or with the 31st day of December. Tuesday of the year 1901 occurring on New Year's Day.

No steps in the nature of an appeal from the judgment were taken during the October Term, except the praying of an appeal to the Court of Appeals on the day that the judgment was rendered, and an order of the Court allowing the plaintiff to deposit $50 in lieu of an appeal bond. The provision governing the settlement of bills of exceptions in that Court is Rule 54, Sec. 2, which is as follows: "The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it, but not longer than 38 days exclusive of Sundays, save in a case begun during a term but not concluded until after the expiration of the term, in which case the trial justice may extend the term, in his discretion, in order to prepare a bill of exceptions."

In cases in which application to extend the term for the purpose in question is made, it is the practice, as shown at page 12 of the Record, for the Court to direct an entry on its minutes on the last day of the term, specifying the cases in which such application has been made, and prolonging the term for 30 days in those cases. In the case now before the Court, however, no application to extend was made during the term, nor until the 7th day of January, 1901, a week after the term had expired, which application was overruled by the Court on the ground that the October Term, at which the trial was held, had ended on the 31st day of December, 1900. Record, page 11. No bill of exceptions was presented to opposing counsel until January 17th, 1901, nor to the Court until January 28th, 1901, on which last mentioned date the trial justice declined to settle the bill, for the reason that the October Term had not been prolonged for the purpose, the bill as presented, moreover, being one upon which counsel had not agreed. (Record, pp. 9-10.)

Thereupon, on February 23rd, 1901, the plaintiff in error applied to the Court of Appeals for a writ of mandamus requiring Andrew C. Bradley, the trial justice, to settle the bill of exceptions, claiming that, as the first Tuesday of Jan-

uary, 1901, was New Year's Day, it was a legal holiday, and that the first Tuesday in January, therefore, was the 8th day of that month. The petition was set for argument March 12, 1901, and was on that date dismissed by the Court of Appeals; whereupon the plaintiff sued out a writ of error to this Court, under which he caused the defendant in the action at law in the lower court to be cited, there being no citation, service or notice to the trial justice, against whom alone the petition for mandamus was directed.

Mr. Justice Bradley died on the 15th day of May, 1902, a suggestion of which fact would ordinarily terminate a proceeding in mandamus. As the present appeal, however, is prosecuted in this Court, not against the officer whom it is sought to compel to do the required act, but against the defendant in the action at law in the Supreme Court of the District of Columbia, and notwithstanding the fact that the latter was not a party to the proceeding in the Court of Appeals here appealed from, the suggestion of death has not been more formally made.

POINTS AND AUTHORITIES.

That the action of the Court of Appeals in denying the petition was proper, will appear upon the following considerations:

I.

There was no record before the Court, complying with its rules; a transcript of only such parts of the record as the attorney for the complainant in error saw fit to designate being presented, as will appear from the order of the attorney at page 10 of the Record, and the certificate of the clerk of the Supreme Court of the District of Columbia at page 11. It is true that Rule V., Sec. *g*, of the Court of Appeals permits the attorney for the plaintiff in error to designate the parts of the record which he considers sufficient to be included in the transcript for determination of the questions to be presented on appeal, provided he serves a copy of such designation upon the opposing counsel, who may thereupon designate such further parts of the record

as he may deem necessary or material for the purposes of the appeal; but no such course was pursued or notice given in the case at bar.

II.

In the second place, as is apparent from the Record, the object of the petition for mandamus was to secure a reversal by the Court of Appeals of a judicial determination by the Court below of a question of law, namely, the question when the October Term of the Supreme Court of the District of Columbia ends, under its rules, when the first Tuesday of the following January happens to fall upon a legal holiday. That this was a question of law, and one which the Court below was not only authorized, but was necessarily required by the facts and circumstances of this case to pass upon, is apparent upon the face of the petition; and that mandamus never lies to reverse the judgment of a Court under such circumstances is well settled. Ex parte Taylor, 14 How. pp. 12–13; ex parte William Many, 14 How. 24–5.

III.

In the third place, it is to be observed that the petition was not based wholly, if at all, upon the refusal of the trial Court to settle the bill of exceptions on the 20th day of January, 1901, when it was presented to him for settlement, but was brought to reverse his action of the 7th day of January, 1901, in refusing to continue the October Term for that purpose. He clearly was without power, on the 20th day of January, to settle the bill, unless the former term had been prolonged for that purpose; and the error assigned in the petition is that the application to continue made on the 7th day of January was in time, on the theory that, the first Tuesday in January being a legal holiday, the January Term of the Circuit Court began on the second Tuesday. But the power to prolong was, in any event, discretionary under the terms of Rule 24, and for this reason, also, is not the subject of coercion or compulsion by mandamus.

That the authorities cited in the opposing brief to the effect that a power given to public officers, though by language indicating a discretion upon their part, is compulsory, and may be called into exercise by mandamus where necessary to *de jure* rights of third persons, are not applicable to the exercise of a discretion judicial in its nature, they themselves expressly declare. Supervisors *vs.* United States, 4 Wallace, p. 447 and citations.

IV.

In the fourth place, the ruling of the trial justice was unquestionably correct. The first Tuesday of Jannary, 1901, was, it is true, the first day of January, and, under the provisions of Sec. 992, of the Revised Statutes of the District of Columbia, then in force, that day, as, also, the 4th day of July, the 25th day of December, Inauguration Day, the 30th day of May, and such days as might be appointed or recommended by the President as a time of public fast or thanksgiving, to which the 22d day of February has since been added, were made "holidays within the District, and shall, for all purposes of presenting for payment or acceptance, for the maturity and protest, and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, or other negotiable or commercial paper, be treated and considered as is the first day of the week, commonly called Sunday, and all notes, drafts, checks, or other commercial or negotiable paper falling due or maturing on either of said holidays shall be deemed as having matured on the day previous." But there is neither any precedent nor principle upon which the fact that the day designated by the rules of the Court for the commencement of the January Term happened to fall upon Sunday, or upon a holiday made by statute the equivalent of Sunday, can be held to have extended the preceding term for a week. If the analogy of the provisions of the statute referred to in regard to commercial paper, which seems to have been the subject principally contemplated by it, is to be followed, then the only effect of such a holiday is to make the preceding day the commencement of the new term; while, if the analo-

gies of the common law govern, the only effect, according to the most favorable authorities, would be to make the new term commence on the day following.

But, it is submitted, the fact that the first day of the new term fell upon a legal holiday had no effect whatever upon the commencement of that term. It still began on the first Tuesday of January, although for many purposes that day in the year 1901 was *dies non juridicus*. Had the first Tuesday in January fallen upon a juridicial day, the old term, under the rule, unquestionably would have ended with the day preceding; and, this being so, there can be nothing in the fact that the first Tuesday was *dies non* which could extend the old term beyond such preceding day.

Verdicts may be received on Sunday (Reid *vs.* State, 53 Ala., 402; Henderson *vs.* Reynolds, 84 Ga., 159 and citations; Webber *vs.* Merrill, 34 N H., 202; Stone *vs.* Bird, 16 Kans., 488; State *vs.* Penley, 107 N. Car., 808; Hiller *vs.* English, 4th Strobh, 486), and the jury may be further instructed, and any orders or motions incidental to receiving the verdict may be made (Jones *vs.* Johnson, 61 Ind., 257; McCorkle *vs.* State, 14 Ind., 39, 43; People *vs.* Odell, 1st Dak., 197). Recognizances (State *vs.* Douglass, 69 Ind., 544; Johnston *vs.* People, 31 Ill., 469) and bail may be taken (Watts *vs.* Commonwealth, 5 Bush, 309; Hammons *vs.* State, 59 Ala., 16; Weldon *vs.* Colquitt, 62 Ga., 449); and even injunctions may issue on that day, in cases of necessity (Langalier *vs.* R. R. Co., 64 Ill., 247). It is impossible, therefore, to maintain that the mere commencement of a term cannot date from that day, or from a holiday placed upon the same footing with Sunday.

If any term of the Court should be made by its rules to commence on the last Tuesday in February, for example, and in any year that day should happen to fall on the 22d day of that month, which is now made a legal holiday, no term of the Court would be possible for a year, under the construction upon which the contention of the plaintiff in error rests.

V.

In the fifth place, in the absence of special circumstances,

not arising from any fault or omission upon the part of the exceptant, the trial Court is without power to settle or sign a bill of exceptions after the end of the term, unless, during the term, it has been continued for the purpose. Dredge *vs.* Forsythe, 2d Black, 563; *In re* Wright 134 U. S., 136; Muhler *vs.* Ehlers, 91 U. S., 250; Bank *vs.* Eldred, 143 U. S., 293, 298; Brown *vs.* Bradley, 6 D. C., App., 207; Coe *vs.* Morgan, 13 Fed. Rep., 844, *note* and citations; Western Dredging Co., *vs.* Heldmaier, 116 Fed. Rep., 179.

The rules of Court are a law to the Court as well as to the suitors, so long as they remain in force (Johnson *vs.* Wright, 2 D. C., App., p. 220), and cannot be dispensed with to meet the supposed hardships of particular cases (Talty *vs.* District of Columbia, 30 Wash. Law Reporter, 774). Certainly the present case is the first instance of an attempt to compel the Court by mandamus to dispense with or disregard them.

VI.

In the sixth place, it is so obvious that the present writ of error must fail for want of proper parties, that it is, perhaps, improper to consume the time of the Court by the discussion of any other point in the case. The proceeding below was a petition by mandamus, complaining of no act or conduct of the present defendant in error, seeking no relief as against him, and to which he was not even made a party. To the present writ of error, which is simply and only an appeal from the decision of the Court of Appeals upon that application, the defendant in error, and he alone, is cited. This Court would seem to have no alternative but to dismiss the case upon its own motion.

Respectfully submitted,

J. J. DARLINGTON,

Attorney for Defendant in Error.

Supreme Court of the United States.

No. 229—October Term, 1902.

Eugene C. Gordon, for the use of Mary C. Roper, Plaintiff in Error, vs. Arthur E. Randle. } In error to the Court of Appeals of the District of Columbia.

[April 27, 1903.]

Mr. Justice McKenna delivered the opinion of the Court.

The purpose of this writ is to review an order of the Court of Appeals of the District of Columbia, made March 12, 1901, denying a petition for mandamus to require Andrew C. Bradley, at that time an Associate Justice of the Supreme Court of the District of Columbia, to settle a bill of exceptions.

The plaintiff in error brought suit against defendant in error, in the Supreme Court of the District of Columbia, on the 20th day of April, 1897, to recover the sum of $5,900, on several causes of action. They need not be described nor the defenses which were interposed to them. It is enough to say that upon the issues made a verdict resulted for defendant in error, on the 16th of November, 1900.

On December 14, 1900, a motion for new trial was made by plaintiff and denied by the court, and judgment entered on the verdict. The plaintiff prayed for and was allowed an appeal to the Court of Appeals of the District. The case was tried and judgment entered at October term, 1900, which expired December 31, 1900, unless it had been continued, and this resulted, it is contended, from the following proceedings: On the 7th day of January, 1901, the plaintiff through his attorney deposited with the clerk fifty dollars in lieu of a bond on appeal, and moved the court that October term be prolonged by adjournment in order to prepare a bill of exceptions. The motion was overruled on the ground that October term had ended on the 31st of December, 1900. Notice was given by the attorney for the plaintiff that he would present the "bill of exceptions to the court for settlement before Justice Bradley in the Circuit Court number 2." The bill was presented in pursuance of the notice, but Justice Bradley declined to settle the bill on the ground that October term had not been prolonged. The petition now under review was then presented to the

Court of Appeals praying "that the writ of mandamus may issue, requiring Andrew C. Bradley, an Associate Justice of the Supreme Court of the District of Columbia, to settle the bill of exceptions in this cause." The petition was dismissed.

The rule of the court in regard to bills of exceptions is as follows:

"SEC. 2. The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it, but not longer than thirty-eight days, exclusive of Sundays, save in case of a trial begun during a term but not concluded until after the expiration of the term, in which case the trial justice may extend the term in his discretion in order to prepare a bill of exceptions."

The case presents some anomalies. The mandamus was prayed against Justice Bradley for refusing to act officially, but the citation in error was directed to Arthur E. Randle, and he alone is defendant in error here. He was a party in the original cause, but not a party in the proceedings for mandamus. Making him a party here is attempted to be justified by the death of Justice Bradley and the action of the Court of Appeals in not entertaining the petition for mandamus. The immediate answer would seem to be that mandamus is itself an action, and can only, like other actions, be prosecuted against the parties to it, and that one of two effects resulted from the death of Justice Bradley, either the action abated or could only be continued against the person who succeeded to his office and duty.

But passing this, we think the main contention of plaintiff in error is untenable. The argument of plaintiff is that the purpose of the rule was to allow thirty-eight days for the settlement of bills of exceptions, and to afford time to do so the rule provided that the term might be prolonged by adjournment, and the duty of prolonging the term was imposed on the court. We do not so interpret the rule. It provided the means for parties to secure the necessary time to present bills of exceptions. The court was not required to anticipate the intention of parties. Its duty under the rule, like its other duties, was to be exercised when invoked.

But it is also insisted that a motion to prolong the term was made in time. The argument to support this is that October term did not end on the 31st of December, 1900, but continued until the 7th of January, 1901, because by Rule 3 of the Supreme Court of the District of Columbia the January terms of the Circuit Court commence on the first Tuesdays in January, and that the first Tuesday of January, 1901, fell on the first of January, which, being a holiday, and therefore, as it is insisted, a *dies non*, the term did not commence until the following Tuesday, the 8th of January. We cannot concur in the contention. The term commenced on the first of January and the only effect of the holiday was to deprive the court of the

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power of doing any business but to discharge those who had been required to attend until the succeeding day, when the general duties and powers of the court could be legally exercised. It follows, therefore, that there was no error in refusing to settle the bill of exceptions, and the petition for mandamus was properly denied.

Order affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.